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October 9, 2009

Susan Hudson, Clerk
Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, Vermont 05620-2701

Docket No. 7466

Dear Sue:

Enclosed please find a Certificate of Service and a Memorandum and Proposed Findings of Fact on behalf of the Vermont Energy Investment Corporation for filing in the above-captioned matter.

Thank you.

Sincerely,



Gerald R. Tarrant, Esq.

GRT/dp

Enclosures

cc: Service List
Client

STATE OF VERMONT
PUBLIC SERVICE BOARD

RE: INVESTIGATION INTO PETITION FILED)
BY VERMONT DEPARTMENT OF PUBLIC) Docket No. 7466
SERVICE RE: ENERGY EFFICIENCY UTILITY)
STRUCTURE)

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2009, I served a copy of a Memorandum and Proposed Findings of Fact in the above-captioned matter upon the parties hereto by mailing it, via first-class mail and electronic mail, to the addresses listed below.

Dated at Montpelier, Vermont, this 9th day of October, 2009.

TARRANT, MARKS & GILLIES

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Docket No. 7466

MEMORANDUM AND PROPOSED FINDINGS OF FACT

OCTOBER 9, 2009

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STATE OF VERMONT
VERMONT PUBLIC SERVICE BOARD

Docket No. 7466

RE: Investigation in Petition Filed by)
Vermont Department of Public Service)
Re: Energy Efficiency Utility Structure)

**VERMONT ENERGY INVESTMENT CORPORATION'S
MEMORANDUM AND PROPOSED FINDINGS OF FACT**

Vermont Energy Investment Corporation (VEIC), by and through its attorneys Tarrant, Marks & Gillies, submits the following memorandum and proposed findings of fact.

INTRODUCTION

The VEIC and the Burlington Electric Department (BED) have performed exceptionally well in the operation of the Energy Efficiency Utilities (EEUs) over the past nine years, despite the shortcomings of the 3-year contract model. A new Order of Appointment model is essential for the EEUs to fully meet their potential to acquire energy efficiency resources on behalf of Vermont ratepayers. The proposal of the Department of Public Service for a "rolling" re-appointment structure will help avoid the "end effects" that would otherwise become manifest as the end of the appointment period draws closer. A 12-year Order of Appointment with potential extension every 6 years would provide the maximum benefits under the new structure. There are sufficient monthly, quarterly, and annual accountings and other bench markings that will ensure ratepayers are protected. A rigorous structure of benchmarking, performance review, and evaluation will minimize any potential risks to ratepayers for an appointment of this length. Based upon their respective exemplary performance to date, VEIC and BED should be granted the initial Orders of Appointment without an initial Overall Performance Assessment.

I. **A New, Order-of-Appointment Structure For Vermont's Energy Efficiency Utility Would Offer Substantial Benefits and Improvements over the Current Model, as Well as Address a Number of Identified Shortcomings of the Current Model.**

1. The contract structure under which Vermont's Energy Efficiency Utility (EEU) has operated since its inception has led to good performance. Poor Direct, page 5, line 5; Steinhurst Direct, page 13, line 2; Hamilton Direct, page 30, line 4; VEIC Exhibit BH-2; Plunkett Rebuttal, page 30, line 2; VEIC Exhibit JJP-2; also see Cross-Examination of Buckley, Trs. 9/16/09, page 145, lines 7-19 on how VEIC and BED have worked cooperatively and successfully with one another.

2. The issues identified by the Board at the outset of the workshop process leading to this docket in its "Revised Task Statement for Discussion of EEU Structure" (Board Exhibit 2) were explored fully in those workshops and in this docket, and can now be adopted as findings of fact:

- A. The current three-year contract cycle is problematic because:
- The regional Forward Capacity Market requires bidding three years prior to the time of delivery. It is difficult for the EEU to participate when it must bid into a time period subsequent to the end of the EEUs' current contract. Poor Direct, page 6 line 10; Buckley Direct, page 3, line 11; Steinhurst Direct, page 5, line 8; Hamilton Direct, page 25, line 18.
 - The last time the Board bid out the EEU contract, it received only two bids. The lower the number of bids received, the less well the competitive bidding model works. Poor Direct, page 7, line 24; Martin Direct, page 3, line 8.
 - It is difficult for the EEU to engage in effective long-term planning when its contract extends for only three years. Poor Direct, page 7, line 2; Buckley Direct, page 5, line 8; Bentley Direct, page 3, line 6; Steinhurst Direct, page 4, line 16; Martin Direct, page 4, line 1; Hamilton Direct, page 19, line 17; Cross-Examination of Plunkett, Trs. 9/16/09, page 16, line 17.

- It is difficult for any organization to compete effectively in hiring and retaining employees when job stability is periodically at risk. The ability to attract and retain the most talented staff is likely enhanced by an Order of Appointment, rather than a short-term contract cycle. Fratto Direct, page 7, lines 11-13; Buckley Direct, page 3, lines 15-16; Cross-Examination of Hamilton, Trs. 9/15/09, page 234, lines 19-25; Cross-Examination of Buckley, Trs. 9/16/09, page 146, lines 14-22.
- B. The fact that the Board oversees the EEU through a contract (regardless of the length of that contract) creates several challenges:
- Over the past seven years, the EEU program has become increasingly complex as the EEU has offered new services, including Geographic Targeting. As a result, the contract model may no longer be the appropriate model for overseeing a program of this size and complexity. Poor Direct, page 6, lines 4-23; Bentley Direct, page 3, line 6; Steinhurst Direct, page 4, line 16; Hamilton Direct, page 21, lines 3-13.
 - The Board's judicial role with electric utilities has always been a source of potential conflict with its administrative role with respect to the EEU. In addition, the Board interacts differently with the Department of Public Service ("Department") when the Board acts in its administrative role of overseeing the EEU, compared to when the Board is acting in its quasi-judicial capacity. In the past, the need to avoid *ex parte* communications has occasionally caused problems that were addressed by, among other solutions, Board staff leaving the room. For example, Board staff have left the room during contract negotiations, so that conversations could occur between the Department and the EEU Contractor, related to a contested case pending before the Board. As the EEU is more fully integrated into utility planning efforts through activities such as Geographic Targeting and the Vermont System Planning Committee, the potential for such conflicts increases. This could make it increasingly difficult for the Board to function well in its role as contract manager. Poor Direct, page 10, lines 23-27 to page 11, lines 1-8; Buckley Direct, page 3, line 16- 21; Bentley Direct,

page 6, line 24; Steinhurst Direct, page 8, lines 20-23 to page 9, lines 1-3; Hamilton Direct, page 31, lines 18-21 to page 32, lines 1-10.

- The potential for conflict regarding the Board's roles has been dealt with judicially by prohibiting the EEU from intervening as a party in proceedings before the Board. This was necessary to avoid even the perception of a conflict of interest related to the specific issues under discussion, due to the Board's special contractual relationship with one party. Even though the Board has allowed the EEU to provide evidence regarding its operations, because the EEU is now more fully integrated with utility planning efforts, the current restrictions on the EEU's participation in Board proceedings could become increasingly problematic. *Id.*
- From the beginning of the EEU, the Board has restricted the EEU's ability to provide policy advice or to lobby other entities because of the risk that the EEU, as the Board's contractor, could be perceived as speaking for the Board. When the regional Forward Capacity Market was being developed, the Board loosened this restriction with respect to Market Participation in NEPOOL and other regional market activities. However, even though there is coordination between the Board and the EEU regarding positions taken in the regional arena, the Board remains concerned about the potential for confusion about whether the EEU is speaking for itself, or for the Board as its contractor. *Id.*

3. As has been extensively explored in this Docket and in the workshops that preceded it, there are opportunities to improve upon and address shortcomings of the current structure. While keeping the best features of the current structure, an appointment model offers several ways to “make a good thing better.” Hamilton Direct, page 12, line 6; Cross-Examination of Buckley, Trs. 9/16/09, page 146, lines 23-25 to page 147, lines 1-6.

4. An Order of Appointment structure can remedy many of these shortcomings and support ongoing improvement to achieve EEU goals. As authorized by the Vermont Legislature, the Board may issue an Order of Appointment to the EEU for a period of up to 12 years (30 V.S.A. § 209(d)(5)). This term of appointment would allow the EEU to engage more effectively in initiatives with necessarily longer time horizons, such as those relating to market

transformation and the pursuit of more comprehensive and deeper levels of energy efficiency. Fratto Direct, page 3, line 22; Poor Direct, page 7, line 3-4; Buckley Direct, page 5, lines 6-14; Bentley Direct, page 3, line 4; Steinhurst Direct, page 9, lines 8-23; Hamilton Direct, page 13, lines 15-21 to page 14, lines 1-4. It also eliminates the conflicting roles of the Board as both regulator and contractor, creating a structure that is more consistent with that between the Board and distribution utilities. Poor Direct, page 10, lines 23-27 to page 11, lines 1-8; Steinhurst Direct, page 8, lines 20-23 to page 9, lines 1-3; Hamilton Direct, page 31, lines 18-21.

II. A “Rolling” Appointment Structure Offers the Potential for Greater EEU Stability and the Avoidance of “End Effects” Associated with End-of-Cycle Issues of an Appointment Term.

1. Several parties to this docket have identified the “end effects” that occur towards the end of a contract cycle to be problematic for the EEU. Fratto Direct, page 10, lines 7-10; Poor Rebuttal, page 3, lines 26-29 to page 4, lines 1-4; Cross-Examination of Steinhurst, Trs. 9/15/09 page 107, lines 8-20. This describes the phenomenon in which as an appointee or contractor approaches the time of expiration of the appointment or contract, they may be less likely to engage in long-term activities that extend beyond that point. *Id.*

2. A “rolling” appointment structure, in which an Order of Appointment can be renewed mid-appointment based upon good performance of the appointee, will prevent these “end effects” from taking place, because a well-performing appointee will never actually reach the end of the appointment. Fratto Direct, page 10, lines 1-2; Poor Direct, page 16, lines 10-15. With a 12-year Order of Appointment, at the 6-year point, the Board could determine, through an Overall Performance Assessment (OPA), that the appointee was performing well and decide to extend the appointment for an additional six years. This “rolling” process could continue indefinitely, avoiding end-of-appointment “end effects” from coming into play. Cross-Examination of Steinhurst, Trs. 9/15/09, page 118, lines 14-19; Cross-Examination of Poor, Trs. 9/15/09, page 40, lines 16-19.

3. A “rolling” appointment need not be limited to six years in length, as proposed by the Department, to achieve its structural benefits. Cross-Examination of Poor, Trs. 9/15/09, page 40, lines 16-25 to page 41, lines 1-12; Cross-Examination of Poor by Ms. Bishop, Trs.

9/15/09, page 76, lines 12-23; Cross-Examination of Hamilton, Trs. 9/15/09, page 227, lines 4-11; Cross-Examination of Plunkett, Trs. 9/16/09, page 101, lines 5-10; Cross-Examination of Buckley, Trs. 9/16/09, page 149, lines 2-16. An appointment of 12 years in length provides the same benefits, while offering the additional benefit of more closely aligning the duration of the appointment with the long-term activities of the EEU, such as participation in the Forward Capacity Market. Cross-Examination of Steinhurst, Trs. 9/15/09, page 139, lines 9-15; Cross-Examination of Hamilton, Trs. 9/15/09, page 237, lines 16-25 to page 238, lines 1-4. Such a structure represents a reasonable “middle ground” that balances accountability and stability. Cross-Examination of Bentley, Trs. 9/16/09, page 122, lines 6-10. It may be a “fair compromise” if it incorporates regular benchmarking studies. Cross-Examination of Martin, Trs. 9/16/09, page 135, lines 14-15.

III. The Maximum (12-Year) Term for a Rolling Order of Appointment Will Result in the Greatest Benefits and Improvements over the Current Structure.

1. A long-term appointment offers advantages in areas such as program stability, long-term customer relationships, participation in the Forward Capacity Market (FCM), and utility planning and forecasting processes. Fratto Direct, page 3, line 22; Hamilton Direct, page 19, lines 17-22 to page 20, lines 1-6; Plunkett Rebuttal, Page 6, line 16; Cross-Examination of Fratto, Trs. 9/15/09, page 179, lines 18-25; Cross-Examination of Buckley, Trs. 9/16/09, page 146, lines 2-25. Some of these areas, such as forecasting, operate within time horizons that extend beyond even 12 years. Put another way, “longer is better.” Cross-Examination of Bentley, Trs. 9/16/09, page 109, line 7. Stated another way, “the longer term does offer opportunities” for more efficiency. Cross-Examination of Buckley, page 146, line 25 to page 147, line 1.

2. A term closer to 12 years in length would deliver the “maximum benefits” under the new structure and therefore is a desired outcome of this proceeding. Cross-Examination of Fratto, Trs. 9/15/09, page 168, lines 24-25. Taken as a whole, any disadvantages of a 12-year appointment are outweighed by the advantages. Fratto Direct, page 4, lines 17-18;

Cross-Examination of Buckley, Trs. 9/16/09, page 145, lines 24-25. A longer term equates to more benefits to customers, particularly larger customers. *Id.*, at lines 11-14.

3. The advantages of a 12-year appointment outweigh the disadvantages. Cross-Examination of Fratto, Trs. 9/15/09 page 167, lines 13-18; page 168, lines 9-12. In fact, the Department's independent consultant found that if the appointment dropped below six to eight years, some of the advantages would begin to disappear or diminish. *Id.*, at lines 19-23.

4. A shorter Order of Appointment risks replicating the shortcomings of the current contract model (Steinhurst Rebuttal, page 4, line 5; Plunkett Rebuttal, page 20, lines 23-24; Cross-Examination of Steinhurst, Trs. 9/15/09, page 114, lines 8-13), particularly if it is not greater than six to eight years in length. Fratto Direct, page 4, lines 22-23; Cross-Examination of Fratto, Trs. 9/15/09, page 168 lines 19-20. Such an appointment may also distract the EEU from its mission (Buckley Direct, page 5, line 10-14) and be viewed as functionally similar to the current contract model by market players such as ISO New England. Cross-Examination of Plunkett, Trs. 9/16/09, page 91, lines 10-25; Cross-Examination of Buckley, Trs. 9/16/09, page 149, lines 17-21.

5. The Department's independent consultant concluded that the June 16, 2008, "Draft Of A Recommendation for a New Energy Efficiency Utility Structure" (Draft Recommendation) reasonably addressed the disadvantages related to a 12-year appointment. Cross-Examination of Fratto, Trs. 9/15/09, page 169, lines 12-16, and page 170, lines 9-14.

6. BED, as the other EEU in Vermont, was comfortable with a 12-year term because it leads to a better, more efficient energy efficiency program. Cross-Examination of Buckley, Trs. 9/16/09, page 147, lines 10-12.

IV. Savings Verification, Detailed Frequent Reporting, Extensive Performance Evaluation, and Benchmarking Reviews Can Ensure a Proper Balance Between EEU Stability and Accountability.

1. Substantial, ongoing performance reviews that would be sufficient to support a 12-year Order of Appointment can be put into place. A structure that provides for a Board-led OPA at least every six years would be sufficient for a 12 year appointment, given the strong performance of VEIC. Exhibit DPS-1, page 43.

2. A requirement that an OPA be conducted at least every six years need not preclude more frequent reviews if necessary. Any interested party would have the ability to petition that Board to conduct an OPA for cause at any time. Fratto Direct, page 7, lines 24-26; Buckley Direct, page 6, line 12; Hamilton Direct, page 18, lines 11-21 to page 19, lines 1-2.

3. Performance risks associated with a longer-term appointment can be sufficiently managed. A structure that maintains the successful performance-based aspect of the EEU, combined with continued monthly, quarterly, and annual reporting, annual savings verification, a triennial independent audit, and the 6- year OPA process will provide numerous opportunities for review of EEU performance and the ability to address in a timely manner any issues that might arise. Fratto Direct, page 7, line 20; Buckley Direct, page 5, line 18; Steinhurst Direct, page 12, line 4; Hamilton Direct, page 14, line 7; Cross-Examination of Hamilton, Trs. 9/15/09, page 199, lines 6-12.

4. BED has a contract with VEIC on the services that are provided to Burlington. BED annually reviews that contract to ensure that programs are provided properly and efficiently. Cross Examination of Buckley, Trs. 9/16/09, page 145, lines 7-13.

5. An additional safeguard against being “locked into” a poorly performing appointee can be provided through a provision that any party may petition the Board for an OPA at any time, which could lead to removal of the appointee if cause is found. Cross-Examination of Poor, Trs. 9/15/09, page 31, lines 2-7; Cross-Examination of Fratto, Trs. 9/15/09, page 170, lines 21-25.

6. The Department’s independent consultant testified that one of the best ways to mitigate any potential disadvantage of the 12-year appointment is the ability of the Department or any other party to petition the Public Service Board at any time for review. Cross-Examination of Fratto, Trs. 9/15/09, page 170, lines 9-14.

7. The Department’s independent consultant testified that “there are enough safety valves in all of the draft recommendations to essentially mitigate the possibility that the state would get quote unquote, “locked into an appointee.” Cross-Examination of Fratto, Trs. 9/15/09, page 170, lines 21-25; Cross-Examination of Hamilton, Trs. 9/15/09, page 198, lines 20-25.

8. “Benchmarking” can be effectively employed to ensure the EEU is performing well, compared to its peers. The Department has proposed a triennial benchmarking evaluation it labels a “Preliminary Performance Review” (PPR). Poor Direct, page 15, line 3. A benchmarking evaluation would provide beneficial comparative information, though it need not be embedded within a new performance review apparatus or coupled to the OPA process. Cross-Examination of Hamilton, Trs. 9/15/09, page 221, line 3. The Department has never conducted such a review, although it has the ability and means to do so. Cross-Examination of Poor, Trs. 9/15/09, page 21 lines 2- 5 and 13-17.

9. Such comparative reviews can be undertaken as part of the Department’s existing evaluation activities, which indeed the Department has proposed to do in its draft EEU evaluation plan for 2009 – 2011. Cross-Examination of Poor, Trs. 9/15/09, page 24, lines 10-20 and page 29, lines 19-22. The results of this type of evaluation, as with all other types of evaluation, should be available to the Board, DPS, and all other parties to consider EEU performance; these results would also help to inform processes such as the setting of Quantitative Performance Indicators. Cross-Examination of Poor, Trs. 9/15/09, page 29, lines 8-13; Cross-Examination of Steinhurst, Trs. 9/15/09, page 130, line 6; Cross Examination of Hamilton, Trs. 9/15/09, page 219, lines 4-6.

10. The Board does not have the statutory authority to compel the Department to conduct a PPR (Examination of Poor by Chairman Volz, Trs. 9/15/09, page 80, lines 3-18), so including such a requirement in a new EEU structure may confuse other parties, and will not necessarily result in the Department undertaking a level of review that it otherwise might fail to perform.

V. VEIC Has Performed Well in the Operation of the EEU, Has Experience in the Areas that Would Be Included in the Scope of the New EEU Structure, and Should Be Granted the Initial Order of Appointment Without an Initial Overall Performance Assessment.

1. VEIC, the incumbent EEU contractor, has an excellent record of performance in its operation of Efficiency Vermont over a several-year period, and is recognized as a national leader in energy efficiency. Poor Direct, page 5 line 6; Steinhurst Direct, page 12 line 14;

Hamilton Direct, page 30 line 4; VEIC Exhibit BH-2; Poor Rebuttal, page 5 line 16; Steinhurst Rebuttal, page 9 line 15; Plunkett Rebuttal, page 29 line 16; VEIC Exhibit JJP-2; Cross-Examination of Poor, Trs. 9/15/09, page 19, lines 18-23; Cross-Examination of Buckley, Trs. 9/16/09, page 148, lines 18-25.

2. Vermont has consistently been rated as having one of the best energy efficiency programs in the country. Cross-Examination of Poor, Trs. 9/15/09, page 18, lines 17-24.

3. The most recent 2009 triennial audit issued to the Vermont Legislature concluded that Efficiency Vermont's programs are highly cost effective. Cross-Examination of Poor, Trs. 9/15/09, page 19, lines 14-23.

4. VEIC cooperates with BED on services provided to Burlington and enjoys a good working relationship with BED. VEIC provides certain services to Burlington under contract. VEIC and BED collaborate on many industry-side efforts that are important to the State. Cross-Examination of Buckley, Trs. 9/16/09, page 145, lines 2-19.

5. An initial OPA would be a "long, drawn-out, expensive process" that is not necessary. Cross-Examination of Bentley, Trs. 9/16/09, page 112, lines 6-9. It would take VEIC's focus away from its primary responsibilities of saving energy to demonstrate justification for re-appointment. Bentley Direct, page 19, line 6; Martin Direct, page 4, line 19; Steinhurst Rebuttal, page 9, line 15; Plunkett Rebuttal, page 28, line 1; Plunkett Sur-Rebuttal, page 7, line 17.

6. VEIC has extensive organizational experience with the full scope of EEU activities that are contemplated under the Order of Appointment structure. Pursuant to its current Efficiency Vermont contract, VEIC is undertaking activities in forecasting, such as Forecast 20; and unregulated fuels energy efficiency programs, as authorized by the Legislature, to use FCM and RGGI revenues. Board Exhibit 3, Attachment L; Cross-Examination of Bentley, Trs. 9/16/09, page 129, line 19. VEIC also has extensive experience in areas such as combined heat and power, renewable energy, and program design and administration for a wide range of energy services.

7. Based upon VEIC's record of past performance, and the opportunity for frequent review of appointee performance going forward, VEIC should be awarded the initial

Order of Appointment. Buckley Direct, page 7, line 12; Bentley Direct, page 19, line 6; Steinhurst Direct, page 12, line 14; Martin Direct, page 4, line 19; Hamilton Direct, page 30, line 4. Based on that record of performance, a change from the incumbent is “unlikely”. Cross-Examination of Poor, Trs. 9/15/09, page 34, lines 10-12.

8. Waiting to make an initial appointment will only further defer the benefits of moving to a new structure. Buckley Direct, page 7, line 16; Bentley Direct, page 19, line 15.

9. The Department supports a presumption that the current energy efficiency program administrators—both BED and VEIC—should be the first EEU appointees. Cross-Examination of Poor, Trs. 9/15/09, page 18, line 25 to page 19, lines 1-4.

10. By forgoing an initial OPA and adopting the performance indicators and goals of the current contract for an initial transition period, it is possible to make an initial Order of Appointment by January 1, 2010. Hamilton Direct, page 32, line 20.

VI. The “Contract Administrator” Has Been Valuable in the Current Contract Model and Should Remain an Independent “EEU Facilitator,” Contracting with the Public Service Board.

1. The EEU Contract Administrator in the current model is well established and should be continued under an appointment model. Hamilton Direct, page 37, lines 23-25; Plunkett Rebuttal, page 35, lines 8-11.

2. The position of an EEU Facilitator will continue to hold value for ratepayers by providing timely and independent financial, administrative, and programmatic oversight. Plunkett Rebuttal, page 35, lines 14-16.

3. An EEU Facilitator will enhance EEU transparency and accountability and will reinforce public confidence in the Order of Appointment mechanism. Plunkett Rebuttal, page 35, lines 17-18; Examination of Hamilton by Ms. McHugh, Trs. 9/15/09, page 243, lines 10-17.

4. The independence of the Contract Administrator is one of the position’s greatest attributes. Hamilton Direct, page 38, lines 1-2; Plunkett Rebuttal, page 35, lines 1-2.

5. Independence would be best maintained by having the position contracted by the Public Service Board, as currently done in the contract model. Hamilton Direct, page 38, lines 2-3. The recommendation that the EEU Facilitator report to the Board, rather than the Department,

is a change from the description in the Draft Recommendation of June 16, 2008. Hamilton Direct, page 38, lines 4-6.

6. The Department proposes that if the EEU Facilitator's duties include the possibility of mediation of differences between the Department and the EEU, then the Board should remain the holder of the EEU Facilitator's contract. Poor Rebuttal, page 9, lines 27-29. Should the concept of mediation be removed, then the Department favors either the Board or the Department hold the contract. *Id.*, lines 24-27.

7. There appears to be no reason to eliminate the possibility of mediation in the event of a difference of opinion between the EEU and the Department.

8. Board Rule 5.300, which describes the process to set the Energy Efficiency Charge, assigned to the Contract Administrator several tasks that are independent of the Board's contract for EEU services. These roles would have to be re-assigned if there were no EEU Facilitator. Plunkett Rebuttal, page 37, lines 3-8; Examination of Hamilton by Ms. McHugh, Trs. 9/15/09, page 242, lines 14-21.

9. The EEU Facilitator should continue to provide a monthly review of all EEU invoices. The position should serve as the primary gatekeeper for withdrawals from the EEU Fund, maintaining the current practice of the Contract Administrator of reviewing and approving all invoices for payment. Plunkett Rebuttal, page 35, lines 22-24 to page 36, lines 1-3; Examination of Hamilton by Ms. McHugh, Trs. 9/15/09, page 241, lines 3-25 to page 242, lines 1-25.

10. The Contract Administrator undertakes many responsibilities in terms of reviewing EEU achievement reports and summarizing important elements in a bi-monthly report distributed to the Board, the EEU Advisory Committee and other interested parties. The position reviews long-term monitoring and evaluation research plans and budgets proposed by the Department, makes independent recommendations to the Board, monitors their implementation, and reviews and comments on the Department's final evaluations, as well as the Department's annual verification process. Plunkett Rebuttal, page 36, lines 17-23 to page 37, lines 1-7. These are among many important functions that should be transferred to an independent EEU Facilitator. *Id.*

11. In the event the Board decides against retaining an independent agent to carry out these types of functions, the next best approach would be to transfer these responsibilities to the EEU. This has the advantage of paralleling the assignment of similar functions on the supply side of Vermont's distribution and transmission utilities. The disadvantage would be to remove the independence currently provided by the Contract Administrator in performing these duties. Plunkett Rebuttal, page 37, lines 11-16; Examination of Hamilton by Chairman Volz, Trs. 9/15/09, page 245, lines 17-19.

VII. A Modified Version of the "Draft of A Recommendation for a New Energy Efficiency Utility Structure" Should Be Adopted by the Board as Part of its Order in this Proceeding.

As a result of the workshop process that led to creation of this docket, a document entitled Draft of a Recommendation for a New Energy Efficiency Utility Structure (Exhibit VEIC-5) was created. Subsequent versions of this document were introduced as exhibits by VEIC (Exhibit VEIC BH-4) and the Department (Exhibit DPS-2). These documents are all referred to generically in this discussion as the "Draft Recommendation."

While all parties did not come to a consensus regarding all of the provisions in any single version of the Draft Recommendation, various parties have testified in support of some or all of the provisions of one or more versions of it. Poor Direct, page 13, line 14; Buckley Direct, page 4, line 3; Bentley Direct, Page 11, line 18; Martin Direct, page 4, line 6; and Hamilton Direct, page 13, line 1. While prefiled testimony and cross-examination necessarily focused on a limited number of fundamental issues, each version of the Draft Recommendation identifies a number of additional issues to be considered in structuring an Order of Appointment. Thus, it provides a useful framework for the Board to structure an Order related to this proceeding.

Each version of the Draft Recommendation contains a structure composed of the following parts, which are discussed in turn:

- "Part I. General Structure, Terms and Conditions of EEU Appointment"

- “Part II. Planning, Performance Review, Evaluation and Ongoing Appointment”
- “Part III. Initial Appointment and Transition”
- “Part IV. Summary of Roles and Responsibilities”
- “Part V. Administration”
- “Part VI. Compensation, Revocation and Termination”
- “Part VII. Definitions”
- “Attachment A. Guidelines: Customer-Sited Generation and Combined Heat and Power Projects” (Exhibit VEIC BH-4, pages 1-2)

A. **The Order of Appointment Should Include Provisions Related to the General Structure, Terms, and Conditions of an EEU Appointment.**

1. The Order of Appointment should include general terms and conditions related to the new EEU structure. As described in the various versions of the Draft Recommendation, such provisions would define the legal mechanism for the appointment; the general scope of EEU responsibilities; collection and use of the Energy Efficiency Charge (EEC); structure and function of the EEU Advisory Committee; and duties the EEU Fiscal Agent. Exhibit VEIC-5, pages 2-12; Exhibit VEIC BH-4, pages 2-14; Exhibit DPS-2, pages 3-15.

2. The Order of Appointment should also specify that: (1) the EEU’s responsibilities should include support for Vermont state building efficiency goals as established by 10 V.S.A. s. 581 (Exhibit VEIC BH-4, page 3); and (2) unregulated fuels (URF) energy efficiency should be within the scope of EEU responsibilities, with language adapted directly from the most recent EEU contract (Exhibit VEIC BH-4, page 8). No party objected to inclusion of these provisions in the course of this proceeding, and both changes are reflected in the Department’s version of the Draft Recommendation (Exhibit DPS-2). Regarding unregulated fuels, the Department expressed support for “the addition of provisions in an Order of Appointment to reflect the current requirements bestowed upon an EEU by the Board or the Legislature”. Poor Direct, page 22, line 6.

3. Acquisition of non-EEC funding sources should not result in an offsetting reduction in available EEC funding. Use of EEC resources to leverage other funding is a desirable method for obtaining more cost-effective energy efficiency more quickly (Plunkett Rebuttal, page 38, line 1) and delivering those savings to ratepayers. An offset would discourage the EEU from pursuing non-EEC resources, as there would be a risk that any alternative funding secured would simply be reduced by a corresponding decrease in EEC funding. Similarly, the Conservation Law Foundation (CLF) testified that when the EEU budget was most recently established by the Board, it was done with recognition that additional cost-effective energy efficiency savings could be obtained. Steinhurst Rebuttal, page 11, lines 11-22. A structure that encourages the EEU to acquire non-EEC funding resources without fear that such funding would be offset by a reduction in EEC funding will encourage acquisition of additional cost-effective savings.

4. The EEU Advisory Committee need not be retained within an Order of Appointment structure. VEIC and the Department viewed the committee's role as advisory in nature, and concluded that under a new structure, its duties and structure need not be defined within an Order of Appointment. Hamilton Direct, page 38, lines 11-20; Poor Direct, page 21, lines 3-9. Consistent with the practice of Distribution Utilities, the EEU appointee should be free to appoint such advisory or other committees as it deems necessary to carry out its responsibilities.

B. The Order of Appointment Should Include Provisions Related to Planning, Performance Review, Evaluation, and Ongoing Appointment of the EEU.

1. The Order of Appointment should continue the performance-based structure of the current EEU, in terms of setting goals, evaluating performance and determining continuation or renewal of the appointment. This structure should encompass areas such as the EEU basic framework; the EEU long-term Demand Resources Plan (DRP); review and reset of Quantitative Performance Indicators (QPIs); an Overall Performance Assessment (OPA); end-of-cycle reconsideration of appointment; undertaking of a triennial independent third party audit; ongoing opportunity to consider appointment; interaction with long-range transmission plan;

ongoing monitoring, savings verification and evaluation; and the EEU Facilitator. Exhibit VEIC-5, pages 13-23; Exhibit VEIC BH-4, pages 15-26; Exhibit DPS-2, pages 16-28.

2. Parties expressed differing views regarding a number of issues in this area, which VEIC addressed previously in this Memorandum and Findings, as well as in its prefiled testimony. In summary, a 12-year “rolling” Order of Appointment with reconsideration every 6 years would provide the optimal balance between EEU stability and high levels of accountability and performance.

C. The Order of Appointment Should Include Provisions Related to the Initial Order of Appointment and to Transition Issues.

1. The Order of Appointment should define issues related to the initial Order of Appointment and specify an orderly transition process such as: initial selection of entities; transition timeline; transition process; and the first efficiency resource plan proceeding. Exhibit VEIC-5, pages 24-26; Exhibit VEIC BH-4, pages 27-28; Exhibit DPS-2, pages 29-30.

2. Parties expressed differing views regarding a number of issues in this area, which VEIC addressed previously in this Memorandum and Findings, as well as in its prefiled testimony. In summary, the Order of Appointment should provide for the incumbent EEU contractors (VEIC and BED) to be granted the initial Orders of Appointment without an initial OPA, based upon the record of excellent performance to date in comparison to performance goals and peer program providers.

D. The Order of Appointment Should Include Provisions Defining Roles and Responsibilities of Various Parties Under the New Structure.

1. Under an Order of Appointment structure, there would be revised roles and responsibilities for various parties: the Board; the EEU; the Department; the Distribution Utilities; and the Transmission Utilities. Exhibit VEIC-5, pages 27-32; Exhibit VEIC BH-4, pages 29-34; Exhibit DPS-2, pages 31-36.

2. These revised roles and responsibilities should be defined as part of an Order of Appointment.

E. The Order of Appointment Should Include Provisions Related to the Administrative Functions to Be Performed by an EEU Appointee.

1. Under an Order of Appointment structure, there are various administrative functions that must be performed by an EEU, in areas such as contract management, coordination with Vermont utilities, and cost-effectiveness screening to name just a few. Exhibit VEIC-5, pages 33-44; Exhibit VEIC BH-4, pages 34-45; Exhibit DPS-2, pages 36-48.

2. These administrative functions should be defined as part of an Order of Appointment.

F. The Order of Appointment Should Include Provisions Related to EEU Compensation, and to Revocation or Termination of Appointment.

1. An Order of Appointment structure requires provisions related to compensation of the EEU appointee and revocation or termination of an EEU appointment. Exhibit VEIC-5, pages 44-53; Exhibit VEIC BH-4, pages 46-55; Exhibit DPS-2, pages 48-57.

2. These provisions should be defined as part of an Order of Appointment.

G. The Order of Appointment Should Include a Definitions Section.

1. The Order of Appointment structure contains a number of existing and new terms for which it may be beneficial to provide a definitions section. Exhibit VEIC-5, pages 53-58; Exhibit VEIC BH-4, pages 55-60; Exhibit DPS-2, pages 57-62.

H. The Order of Appointment Should Include Provisions Related to Customer-Sited Generation and Combined Heat and Power.

1. Under an Order of Appointment, any role that an EEU may play in the areas of customer-sited generation and combined heat and power (CHP) projects should be defined. Exhibit VEIC-5, pages 59-61; Exhibit VEIC BH-4, pages 61-63; Exhibit DPS-2, pages 63-65.

2. These provisions should be defined as part of an Order of Appointment.

CONCLUSIONS OF LAW

1. The Board has been authorized by the Legislature to issue an Order of Appointment for up to 12 years in length. (30 V.S.A. § 209(d)(5))

2. The Order of Appointment should specify that the EEU's responsibilities should include support for Vermont state building efficiency goals as established by 10 V.S.A. Section 581.

SUMMARY

Since its creation in 1999, the EEU has performed quite well under its current contract structure. However, as time has passed, this structure has created challenges and has limited the potential of the EEU to fully meet its potential to acquire energy efficiency resources on behalf of Vermont ratepayers. The Board should change the current structure of the EEU.

A new structure known as an Order of Appointment can address those challenges and enable the EEU to meet its full potential. Such a structure should include a mid-term "rolling" re-appointment mechanism, to eliminate the "end effects" that would otherwise become manifest as the end of the appointment period drew closer.

The structural benefits of a "rolling appointment" are not limited to the Department's proposed model. A 12-year rolling Order of Appointment with potential extension every 6 years would provide the maximum benefits. In general terms, a longer term of appointment will better position the EEU effectively undertake activities such as forecasting, Forward Capacity Market participation, development of long-term customer relationships, and market transformation.

The disadvantages of an appointment of this length are outweighed by the advantages. A rigorous structure of benchmarking, performance review and evaluation will minimize any potential risks to ratepayers. No credible evidence was presented justifying a term of less than twelve years.

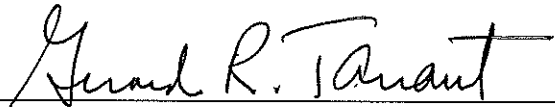
VEIC and BED have demonstrated exemplary performance to date, in comparison to their performance goals and to their peers. They should be granted the initial Orders of Appointment without an initial Overall Performance Assessment.

The Contract Administrator has filled a valuable role under the existing EEU structure as an independent agent of the Board. This role should be continued as the Board-appointed EEU Facilitator under an Order of Appointment.

The proceedings of this docket primarily focused on a number of fundamental issues. However, there are other issues that an Order of Appointment would also need to address. The Draft Recommendation documents developed by a number of parties to this docket address those issues and provide a useful structure available for the Board's use in development of its order in this matter.

Dated at Montpelier, Vermont, this 9th day of October, 2009.

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